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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 611.

THE CURATORS OF THE CENTRAL COLLEGE,
APPELLANT,
VS.
MARY E. ROSE, COLLECTOR, APPELLEE.

APPELLANT'S PETITION FOR REHEARING.

ELLIOTT H. JONES,
Counsel for Appellant.

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VS.

MARY E. ROSE, COLLECTOR, APPELLEE.

APPELLANT'S PETITION FOR REHEARING.

Now comes Appellant and respectfully petitions the ourt to set aside the order heretofore entered dismissing he appeal herein for want of a substantial federal question, nd to grant a rehearing, or reconsideration, of that uestion, for the reasons and upon the grounds as follows, o-wit:

1. A meritorious and substantial federal question is ere involved.

2. The decision of the Missouri Supreme Court here- n is manifestly erroneous, as will be pointed out in the uggestions in support of this petition.

3. The case of *Chicago & Alton R. Co.* v. *Tranbarger*, 38 U. S. 67, upon which this court, as well as the Mis-

souri Supreme Court, chiefly relied, is so clearly distinguishable that it should not be deemed to be a pertinent, much less controlling, authority in this case. Such will be demonstrated in the suggestions in support hereof.

4. The chief ground upon which the Missouri Supreme Court held that the Act of 1851, of Missouri, which granted tax exemption to Appellant, should not be deemed a part of Appellant's contract with the State, as evidenced by its corporate charter, is clearly fallacious. Said ground was that, "No person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit." That principle is not one of universal application. It is applicable only where no contract is involved. If, as here, a specifically applicable statute is a part of a contract, for the reason that it subsisted when the contract was made, and the contract was made in view thereof, as was done here, a party to that contract does have the right to insist that such statute remain unchanged, insofar as it affects his contract. It must first be found, on other grounds, that the statute does not form a part of a contract before the broad statement, above quoted, may be applied.

5. The broad statement to the effect that "no person" has a right to insist that a statute remain unchanged, is in direct conflict with the well established principle that, "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms" (*Wood* v. *Lovett*, 313 U. S. 362). If a statute is a part of a contract, the contract may not be impaired by a change, or repeal, of the statute.

6. Counsel for appellant did not interpret the rule of court providing for a "Statement as to Jurisdiction," as

requiring that the case be briefed therein on the merits. He deemed it sufficient to indicate that a genuine federal question was involved, which sufficed to afford jurisdiction in this court. The Appellant is a worthy institution, which for nearly a century has carried a substantial part of the burden of education in this State. It is submitted that ignorance of its counsel should not prevent it from having a decision, on the merits, of this great court upon a proposition that is so vital to its continued operation.

Respectfully submitted,

ELLIOTT H. JONES,
Counsel for Appellant.

Certificate of Counsel.

I, the undersigned, counsel for Appellant herein, do hereby certify that the above petition for rehearing is not made for vexation or delay, but in good faith, and in the belief that the petition is meritorious.

ELLIOTT H. JONES,
Counsel for Appellant.

SUGGESTIONS IN SUPPORT OF PETITION FOR REHEARING.

I.

Appellant Has a Meritorious Case.

Appellant contends that it has a contract with the State of Missouri, for tax exemption. That claim is based, in the main, upon the principle that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms" (*Wood* v. *Lovett*, 313 U. S. 362). That principle is so well known and so firmly established that a further citation of authorities is unnecessary.

When there are noted the circumstances under which Appellant was granted a corporate charter, evidencing a contract, it will appear that no more appropriate occasion could be presented, than is presented here, for the application of the principle above referred to.

Appellant was granted a corporate charter by a public Act, in 1855 (Laws of Missouri, 1855, p. 106). At that time there existed a statute which proffered tax exemption to institutions of learning (Laws of Missouri, 1851, p. 64). That Act was passed to induce the establishment of schools. The Missouri Supreme Court concedes, in its opinion herein, that said Act afforded tax exemption to appellant until it was repealed, as the court holds. See printed opinion, pages 9 and 13, in the "Statement as to Jurisdiction," herein.

It appears from Appellant's corporate charter that very shortly after the passage of said Act of 1851, the two Missouri Conferences of the Methodist Church, South, de-

termined to send delegates to a convention to consider the matter of the support of education by the church. That convention was held in April, 1853, and the delegates thereto, "resolved to unite the means and efforts of their church in the erection of one college of the highest order, at Fayette, Missouri, in this state, and adopted a plan for that purpose, * * * and now desire an act incorporating the proposed institution" (Laws of Missouri, 1855, p. 106).

The fact that such action of the Methodist Church followed so closely upon the passage of the Act of 1851, offering tax exemption to institutions of learning, warrants the presumption that such action of the church was largely, if not entirely, induced by such offer of tax exemption.

By the Act of 1851, the Legislature, with all due authority, made a formal offer to the effect that, if any persons would establish an institution of learning the State agreed that all lands belonging to such institution should be exempt from taxation. The incorporators of Central College formally accepted that offer by incorporating and establishing said college. That offer and the acceptance thereof afford the essential elements of a contract.

The Act of 1855, incorporating Central College, constituted a contract between the corporation and the State.

> *Dartmouth College* v. *Woodward*, 17 U. S. 518.
>
> *Northwestern University* v. *The People*, 99 U. S. 309.

In *Gulf & G. I. R. Co.* v. *Hewes*, 183 U. S. 66, this court, speaking of a contract arising out of a corporate charter, declared that,

> "* * * every such alleged contract is presumed to have been entered into upon the basis and in contemplation of the existing Constitution and statutes."

In the case of *Ennis Water Works* v. *Ennis*, 233 U. S. 652, this court said:

"In other words, that when we come to consider a contract arising out of a state law or ordinance we will treat it as if there was embodied in its text the settled rule of law which existed in the State at the time the state action relied upon as a contract was taken."

So, there is a presumption both of law and of fact that the incorporators of Central College entered into the contractual obligation to establish and maintain that institution "upon the basis and in contemplation of" the tax exemption offered by the Act of 1851.

There can be no question but that the Act of 1851, was enacted as an inducement and as a consideration for the establishment of private schools. The Constitution of 1820, in force at that time, provided, in Article VI, Section 1, that "Schools and the means of education shall forever be encouraged in this state."

In the case of *State ex rel.* v. *William Jewell College,* 234 Mo. 299, the Missouri Supreme Court, in discussing that constitutional provision, in connection with the Act of 1851 here in question, said:

"Prior to the Constitution of 1865 there was no restriction upon the legislative power in the matter of granting exemptions from taxation. The public policy of the State prior to 1865, as evinced by numerous acts incorporating educational institutions and exempting their property from taxation, is clearly apparent. That public policy was to encourage and foster educational institutions. * * * When these several acts were passed the Constitution said to the lawmakers: 'Schools and the means of education shall forever be encouraged in this State.' Encouraged how? Not by the simple permissive act of giving them a mere license to exist. The State was interested in schools and the constitutional idea was to foster and aid them in such manner as could be done. A few lines from

> *State* v. *Fisk, supra,* are appropriate here: 'How can it be contended that it is the policy of the State to encourage education, and to levy direct taxes upon its citizens for the purpose of furnishing education free, and at the same time refuse exemption to the property of educational institutions which conduce to cheapen education, and place the higher branches thereof within reach of those who would otherwise be a direct tax upon the people of the State if they were to leave such institutions as this of the defendant, and resort to the public schools.' "

In connection with the proposition that it was the public policy of the State when Central College was chartered in 1885, to promote, by tax exemption, the cause of education in the State, it should be noted that it is provided in the Central College charter that the incorporaters, "and their successors in office, are hereby constituted a body politic, with all the rights, powers and privileges usually enjoyed by colleges and universities of the highest grade, or which may be necessary and proper to enable them to promote the cause of learning in the state" (Laws of Missouri, 1855, p. 106).

The incorporators were to have not only the rights, powers and privileges usually enjoyed by colleges, but were to have, in addition, all the rights, powers and privileges, "which may be necessary and proper to enable them to promote the cause of learning in the state." Some meaning and some import must be given to that language. By the Act of 1851 the Legislature had declared that tax exemption was a right and privilege necessary and proper to promote the cause of learning. That Act, *in pari materia* with the charter act, serves to define and make definite the general language of the charter act. Herein we find an additional reason for the application here of the principle that a statute in existence when a

contract is made is read into and becomes a part of the contract.

This case was submitted upon an agreed statement of facts, which is found in the record on file with the clerk. It was agreed, "That said college has always been operated as an eleemosynary institution for the general benefit and not for the purpose of any private gain to any person. That all of its assets have been accumulated by virtue of gifts made to it for the benefit of education."

In the case of *State ex rel.* v. *William Jewell College*, 234 Mo. 299, the Missouri Supreme Court declared, with much emphasis, that a tax exemption privilege should be construed and applied liberally, and not strictly, in favor of such an institution, for the reason that it carries a substantial part of the burden of education which rests, primarily, upon the State. It performs a public function.

In the case of *Washington University* v. *Gorman*, 348 Mo. 310, it was held that relieving the State, to some extent, of the burden of higher education was a good consideration for a contract for tax exemption.

The Missouri Supreme Court held that the Act of 1851 had been repealed by a later adopted Constitution and that Appellant's right to tax exemption had thereby been annulled. Central College has, for nearly a century, faithfully performed the contractual obligation to maintain an institution of learning, which it entered into upon the faith and in consideration of the tax exemption vouchsafed by the Act of 1851. The question at issue here is, may the State withdraw the consideration that induced the contract and maintain that the contract has not been thereby impaired? As was said by Mr. Justice Roberts, for the court, in *Wood* v. *Lovett*, 313 U. S. 362:

> "As in the cases cited, so here, the question is whether the State granted a valuable right which it subsequently essayed to take away."

In the case of *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, it was said:

> "On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation."

If the decision of the State court is manifestly right, it will, of course, be accepted. But, if there is a fairly debatable question appellant is entitled to have the independent judgment of this court thereon. We will endeavor to show that the decision herein of the Missouri Supreme Court is manifestly erroneous. It will certainly be made to appear that the correctness of that decision is fairly debatable.

II.

The State Court Opinion Considered.

The reasons assigned by the Missouri Supreme Court for refusing to apply here the well established principle that a statute in existence when and where a contract is made becomes a part of the contract, are wholly untenable. The court notes that said principle is recognized in Missouri. There is cited the case of *Swabey* v. *Boyers*, 274 Mo. 332, 203 S. W. 204, wherein the court said:

> "It is true, as respondent asserts, that laws in force at the time and place of making the contract which affect its validity, performance, discharge, or enforcement enter into and form a part of it as if they were expressly referred to or incorporated within the terms of the contract (6 R. C. L., Contracts, Sec. 243; *Christian* v. *Insurance Co.*, 143 Mo. 460, l. c. 465; *State ex*

rel. v. *Smith*, 173 Mo. 398, l. c. 420; *Havens* v. *Fire Ins. Co.*, 123 Mo. 403, l. c. 416-17; *Kleeman Co.* v. *Casualty Co.*, 177 Mo. App. 397; *Northern Pacific Ry. Co.* v. *Wall*, 241 U. S. 87, l. c. 91; *Walker* v. *Whitehead*, 16 Wall. l. c. 317). This rule is made to apply, it seems, to every kind of contract which is the subject of statutory enactment."

The court assigned but two reasons for refusing to apply that principle here. The first was that the part of the Act of 1851, which was applicable to Appellant, was but a general rule of law, and that, "No person has any vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit," to quote from the opinion.

If that principle, as broadly stated, is correct, and may be given universal application, then the many decisions of this court are all wrong, which declare that a statute in effect when a contract is made becomes such a part of the contract that a party thereto may insist that the statute be not changed, insofar as his contract is concerned. Obviously, if a statute is a part of a contract, it is no more permissible to impair that part of the contract, by a change in the statute, than it is permissible to impair any other part of the contract. In numerous cases this court has held that a general statute which formed a part of a contract, because the statute existed when the contract was made, could not be changed to the detriment of the contract. *Wood* v. *Lovett*, 313 U. S. 362, is an example.

The broad statement that, "no person" has a right to insist that a statute remain unchanged, is clearly fallacious. If the statute be a part of a contract then a party to the contract does have such right. If there be no contract involved the principle may apply, but if a contract is involved the principle does not apply. Therefore, before it can properly be stated that a certain person has no right to insist that a

certain statute remain unchanged, it must first be found that the person has no contractual right in that statute. Obviously, to apply such statement to show that said statute is not a part of said person's contract is to beg the question. The principle applies only after it has been found, by other tests, that no contract is involved.

The Missouri Supreme Court did not, before applying the broad statement above quoted, undertake to show that the Act of 1851 did not form a part of Appellant's contract with the State. It erroneously undertook to use the fallaciously broad statement to show that no contract existed. It had to assume, erroneously, the non-existence of a contract in order to apply said broad statement.

The cases in which language is used to the effect that, "No person has any vested right in a general rule of law entitling him to insist that it remain unchanged for his benefit," are, in the main, cases in which no alleged contract was involved. In some of the cases wherein it is said that statutory law is subject to change at the will of the Legislature, the court is careful to add, "unless prevented by constitutional limitations" (*Munn* v. *Illinois*, 94 U. S. 113). If the statement is made in a case where a contract was involved, either (a) the contract was one that was subject to alteration, or repeal, by the Legislature, or (b) the subsequent statute, which changed the law, was enacted by virtue of the police power of the state. Of course, if the contract is one that may be altered by the legislature, any statute which forms a part of the contract may be altered. And, indubitably, every contract is made with the knowledge that it may be lawfully affected by proper police regulations. But we are concerned here with a contract, to-wit, Appellant's charter, which was declared to be unalterable (Laws of Missouri, 1855, p. 107, Par. 5). And there is no claim that the Act of 1851 was altered, or repealed by virtue of any police regulation.

The Missouri Supreme Court relies, on this point, upon but two cases, viz., *State* v. *Mo. P. R. Co.*, 242 Mo. 339, and *Chicago & A. Ry. Co.* v. *Tranbarger*, 238 U. S. 67. In the first case the court was considering a statute which required all corporations to make semi-monthly payments of wages to employees. The statute was upheld as a proper police regulation. In the Opinion the court said:

> "Whether the Legislature of Missouri has reserved the power to amend charters of corporations is a point which we do not deem necessary to decide in this case. We can safely uphold the constitutionality of the semi-monthly payment law under the general police power of the State. This power, as we have heretofore decided, was announced and fully preserved in Section 2 of Article XIII, Constitution of 1820, and at no time since that date has it been suspended or placed in abeyance."

That case is not an applicable authority here.

In the *Tranbarger case, supra*, it appeared that Missouri had adopted the Common Law, and, therefore the common law rule regarding surface water. The State granted a corporate charter to a railroad company, and it was contended that the common law rule as to surface water became a part of its contract with the State, evidenced by its charter, and that a statute which changed that common law rule, as to railroads, impaired its contract. This court questioned whether a mere common law principle, in existence long before railroads were even thought of, and which was never made especially applicable to railroads, and which did not materially affect the construction or operation of a railroad, could be deemed to have been within the contemplation of the parties to the contract evidenced by the corporate charter. After discussing that proposition the court said:

"But a more satisfactory answer to the argument under the contract clause, and one which at the same time refutes the contention of plaintiff in error under the due process clause, is that the statute in question was passed under the police power of the state for the general benefit of preventing unnecessary and widespread injury to plaintiff. It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community."

It will thus be seen that the case was really decided upon the proposition that the Constitution does not protect a contract from impairment by a proper police regulation. There was there involved no *statute* which was claimed to be a part of the railroad company's charter, and, particularly, no statute which was distinctly and especially applicable to railroads. In the opinion the court said: "The previous immunity from responsibility for such injury was nothing more than a general rule of law, which was not in terms or by necessity intendment imported into the contract."

In contrast, note that in the case at bar we are considering a statute which was especially applicable to educational institutions, a statute that was an inducement for the acceptance of a charter for such an institution, a statute that materially affected the performance of appellant's obligation to maintain Central College.

In the *Tranbarger case, supra,* this court first found that, for the reasons stated in the opinion, the common law rule as to surface water did not enter into the railroad company's contract. It then, and on that account, applied the principle that it could not be insisted that the rule remain unchanged. The court did not invoke that principle

to indicate that there was not a contract, as did the Missouri court here. We submit that the Tranbarger case is so clearly distinguishable that it may not be considered as a pertinent authority here.

The only other reason assigned by the Missouri Supreme Court for refusing to apply here the principle that a statute in existence when a contract is made becomes a part of the contract, was that the Act of 1851 "did not affect the validity, construction, discharge or enforcement of the Act of 1855, *supra*, granting a charter to the particular appellant." See opinion of the court, page 13 of printed "Statement as to Jurisdiction," herein.

It is impossible to understand how the court could say that the Act of 1851 did not affect the "construction" of Appellant's charter, in view of the court's recognition of the principle that a contract must be construed in the light of the law existing when the contract was made. It is even more impossible to understand how the court could say that tax immunity afforded by the Act of 1851 did not affect the "discharge," that is, the performance of Appellant's contract, which was evidenced by its charter. Appellant's contractual obligation was to establish and maintain a "college of the highest order."

It appears, in the agreed statement of facts herein, that if Central College be required to pay the usual taxes on all the lands owned by it in the various counties of the state, the same would require an annual expenditure of about $8,000. That sum equals the annual income on about $250,000 of the college endowment, or the tuition fees paid by about fifty students. It equals the salaries of two full professors, or the salaries of several instructors. It can not be said, with any semblance of correctness, that the Act of 1851, that is, tax immunity does not "affect" Appellant's obligation to operate Central College. Tax immunity does,

indubitably, affect the performance of Appellant's contract. In the case of *Southern Surety Co.* v. *Oklahoma*, 241 U. S. 582, among many, this court said that,

> "The law existing when a contract is made, and affecting its performance, becomes a part of it."

No principle is more thoroughly settled or firmly established.

We believe that we have shown that the decision of the Missouri Supreme Court to the effect that Appellant does not have a contract with the State for tax immunity, is manifestly erroneous, since we have shown that the reasons assigned for such holding are erroneous. At the very least, such is a fairly debatable proposition. Whether or not Appellant has a contract for tax immunity is a substantial federal question, and suffices to afford jurisdiction in this court on this appeal.

Northwestern University v. *The People*, 99 U. S. 309.

We submit, therefore, that the order heretofore made herein dismissing the appeal for want of a substantial federal question, should be set aside, and that this cause should be reinstated on the docket for hearing on the merits.

Respectfully submitted

ELLIOTT H. JONES,
Counsel for Appellant.